

L465sechonigC

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

-----x

3 SECURITIES AND EXCHANGE
4 COMMISSION,

Plaintiff,

5 v.

18 Civ. 8175 (ER)
Telephone Conference

6 BARRY C. HONIG, et al.,

7 Defendants.

8 -----x

9 New York, N.Y.
10 April 6, 2020
11 11:00 a.m.

Before:

12 HON. EDGARDO RAMOS,

13 District Judge

14 APPEARANCES

15
16 SECURITIES AND EXCHANGE COMMISSION

BY: NANCY A. BROWN

17 BY: JACK KAUFMAN

KATHERINE S. BROMBERG

18 FORD O'BRIEN, LLP

19 Attorneys for Defendant Ladd

20 BY: ADAM C. FORD

L465sechonigC

(The Court and all parties appearing telephonically)

THE COURT: Good morning, everyone.

THE DEPUTY CLERK: Counsel, please state your name for the record. Counsel for plaintiff?

MS. BROWN: Good morning, your Honor. It is Nancy Brown for the Securities and Exchange Commission, and with me are my colleagues Jack Kaufman and Katherine Bromberg.

THE COURT: Good morning.

THE DEPUTY CLERK: For defendant?

MR. FORD: Good morning, your Honor. It is Adam Ford on behalf of defendant Robert Ladd. My client, Mr. Ladd, is also on the call.

THE COURT: Good morning to you all. This matter is on for pre-motion conference. Before we get going I note for the record that it is being conducted by telephone because of the pandemic. We are also being assisted by a court reporter, so when you speak I ask that you please state your name, speak slowly and clearly so that everything can be taken down accurately. And with that, Ms. Brown, let me begin with you. I understand you want to move for partial summary judgment, correct?

MS. BROWN: We do, your Honor. There are two other issues I think before the Court, one is the issue that we raised in our letter that we filed last week which regards our intention to file motion to strike Mr. Ladd's assertion of an

L465sechonigC

1 advice of counsel defense unless he effects all necessary
2 waivers, and I think and not just speak for the defendants,
3 that Mr. Ladd also proposed making a motion for partial summary
4 judgment as well.

5 So, those are the three issues before the Court, as I
6 see them, this morning.

7 THE COURT: So let's start with you, with your
8 proposed motion.

9 MS. BROWN: Okay.

10 So, I would like to start with the motion to strike.
11 So, I think the Court is familiar with the letters. What
12 Ladd's letter makes clear is that he essentially concedes that
13 his good faith reliance defense is in fact an advice of counsel
14 defense but argues that he has just asserted it provisionally,
15 that he is going to wait to actually trigger it. I'm not sure
16 that I understand how that works. I mean, typically one files
17 an answer and the consequences of that answer become effective
18 on filing. If his view is that he can wait until his motions
19 for summary judgment are unsuccessful and then trigger it are
20 they then to, a few years from now, start taking discovery on
21 his advice of counsel defense, or worse, is he going to wait
22 until trial and then trigger it then and so you have to take a
23 break in the trial to get that discovery? So, I think that's
24 one issue. The second issue is even if it is not a classic
25 advice of counsel defense -- and we discussed this in our

L465sechonigC

1 letter -- the law is pretty clear in the Second Circuit that,
2 you know, putting advice of counsel at issue by asserting a
3 good faith defense means that the waiver is triggered
4 nonetheless, whether you assert the actual words "advice of
5 counsel" or not. So, I think in this situation we are entitled
6 to probe what Ladd asks this Court to accept at a face value on
7 his say-so which is that there is simply no evidence that
8 Mr. Ladd possessed additional information regarding Honig and
9 the other status as a group. Under Balestreri the Court, nor
10 we, are required to accept that assertion at face value.

11 THE COURT: I take it that from your perspective this
12 issue is not mooted by Mr. Ladd's more recent letter?

13 MS. BROWN: Not at all, your Honor. I think in his
14 recent letter he makes these concessions, as I note, that it
15 actually is an advice of counsel defense that even if it is not
16 it certainly puts that issue at issue.

17 THE COURT: Again, we can ask Mr. Ford in a minute,
18 but as I read the letter it says the advice of counsel defense
19 in the answer isn't is an advice of counsel defense. But
20 that's not what I am relying on, right?

21 MS. BROWN: I'm not sure I understand the Court's
22 question. I did see him as saying that he was in fact relying
23 on his good faith belief that there was no group, for example,
24 and by asserting that what the Courts in this circuit have held
25 is that that puts advice of counsel at issue because we are

L465sechonigC

1 entitled to probe everything surrounding his good faith belief
2 that he --

3 THE COURT: I just want to make sure that we are all
4 using the same language.

5 MS. BROWN: Okay. I'm sorry.

6 THE COURT: He is saying that he is not asserting a
7 classic advice of counsel defense, correct?

8 MS. BROWN: Yes. He is asserting that although he
9 does drop some footnotes indicating that if he were asserting a
10 classic advice of counsel defense he is not asserting it now,
11 he is just saving -- he is asserting a placeholder for it.

12 THE COURT: Right. And so what he is saying,
13 therefore, because I didn't hear him to concede the point at
14 all -- I mean I could be wrong but I didn't hear him concede
15 the point at all, that he is not asserting a classic advice of
16 counsel defense and he is relying on his good faith belief.

17 MS. BROWN: Right. And so if you proceed from that
18 juncture, I would submit that we still are in the same place
19 which is that we still get to probe that good faith and we
20 can't probe it without interfering with the privilege because
21 that -- you know, what he learned from his counsel obviously
22 goes to his good faith belief that he was acting in conformity
23 with law.

24 THE COURT: Let's go to Mr. Ford. Mr. Ford, are you
25 or are you not relying on whatever he may have learned from his

L465sechonigC

1 lawyers?

2 MR. FORD: Thank you, your Honor. This is Adam Ford
3 speaking.

4 Your Honor got it exactly right. Obviously you read
5 our letter and understood it. We are not asserting the classic
6 advice of counsel defense where we are discussing privileged or
7 intention to rely on privileged communications between him and
8 his lawyer. What we are saying -- I mean, we did put it in, it
9 was an affirmative defense, we are required to put it in, but I
10 have been speaking with the SEC and Ms. Brown for at least six
11 months about this exact issue. My position has never wavered.
12 What we have here, this case is a little unusual in that you
13 have a situation where there is two sides of a transaction,
14 obviously not aligned, they're on opposite sides of the
15 transaction. They happen to have the same law firm. They have
16 different lawyers working on it and they basically, as I
17 understand it, sort of treat it as proper walls and they treat
18 it as they're sort of adverse and on account of that -- and it
19 is the law firm of Sichenzia. The SEC subpoenas Sichenzia and
20 Sichenzia says to the SEC, as I understand it, we have two
21 different clients, each with privileged communications. We are
22 going to maintain those for each of the clients but where those
23 clients are talking to each other, that's not privileged, we
24 are going to treat that as if it is with an outside law firm
25 and we were asked our position, we agreed with that, that makes

L465sechonigC

1 sense from a privilege perspective. And what you get -- and
2 these are hundreds and hundreds of e-mails within Sichenzia but
3 with two different sides, and what is clear from these e-mails
4 that are not privileged is that the other side was representing
5 the Honig side that they were not acting as a group. Right?
6 And my client was told this and my client, along with all of
7 the other non-privileged information, the fact that Sichenzia
8 was hired specifically to advise them and assist with the
9 proper filing, the fact that Sichenzia is an expert, the fact
10 that Sichenzia filed these documents, these are all
11 non-privileged facts that I am, I submit, absolutely allowed to
12 present and as part of my presentation that my client was
13 acting in good faith with no intentions, no knowledge, to
14 violate any of the securities laws. And, as your Honor knows
15 from my letter because I referenced it, I was involved in the
16 Platinum case and this exact issue came up and it was frankly
17 hotly contested and Judge Cogan had absolutely agreed with our
18 position that you are allowed to describe interactions with
19 counsel on a certain general level as part of your presentation
20 and that does not waive privilege and we are seeking to do the
21 exact same thing here, we are simply going to present, based on
22 non-privileged communication, that my client was acting in good
23 faith. And there is -- you know, your Honor, the other big
24 part of this as we say in our letter, there is no evidence that
25 my client believed that these guys were a group. There is no

L465sechonigC

1 evidence. The SEC didn't -- they didn't seek to depose anyone.
2 There is no testimony, there is no documents. And so, the
3 reason that the SEC is now coming before the Court and saying,
4 look, we need to waive privilege, we need to do discovery,
5 because they're not holding anything right now. So --

6 THE COURT: But that's a very different issue,
7 correct?

8 MR. FORD: Yes.

9 THE COURT: The issue and the problem as I see it -- I
10 understand your position -- but essentially it comes down to,
11 yeah, I was talking to lawyers but they were all sort of very
12 less than formal discussions and they were not privileged, and
13 therefore even though I base my good faith, at least in part on
14 those communications with lawyers, it is not really
15 attorney-client privilege.

16 MR. FORD: Right, because some of those communications
17 even weren't with his counsel but with other counsel, counsel
18 from the other -- counsel from the other side of the deal -- I
19 mean from -- it's Barry Honig's counsel that is saying they're
20 not agreeing and there is no way that communication is
21 privileged. Even his own lawyer says Barry Honig's counsel
22 tells me this and that --

23 THE COURT: I understand.

24 So, Ms. Brown, strictly speaking, the communications
25 described by Mr. Ford are not attorney-client so what is it

L465sechonigC

1 that you want to know beyond that?

2 MS. BROWN: Right. So, thank you, your Honor. It is
3 Nancy Brown speaking.

4 I think what we have heard from Mr. Ford is the
5 problem here, it is only half the story. So, yes, we have
6 these non-privileged communications that informed Mr. Ladd's
7 good faith but we don't know what else informed or disinformed
8 Mr. Ladd's good faith. So, for example, did he have further
9 communications with MGT's counsel regarding whether to disclose
10 Honig's group's ownership in SEC filings? We know that was an
11 issue because Honig -- MGT's counsel raised that issue which is
12 the only time the topic was raised. What questions did he ask
13 his own counsel regarding what independent duty he had to
14 investigate things that Honig's counsel was telling him? Did
15 MGT's counsel understand that Mr. Honig's counsel himself had
16 co-invested with Honig in numerous Honig deals? Did they
17 discuss that fact with Ladd? Did Ladd know that Kesner
18 frequently invested with Honig? Did he disclose that fact to
19 MGT's lawyers at Sichenzia?

20 THE COURT: Have these people been deposed?

21 MS. BROWN: No, because the privilege was asserted.

22 THE COURT: How about Mr. Ladd?

23 MS. BROWN: Mr. Ladd has been deposed and he, as we
24 put in our letter, disclosed that he was relying in fact on
25 counsel -- advice he received from his own counsel and advice

L465sechonigC

1 he received from Honig's counsel.

2 THE COURT: And then when was that? I guess I am
3 asking this because why is this coming up now?

4 MS. BROWN: Well, your Honor, it came up in October.
5 We, as soon as Mr. Ladd testified to those facts, we again
6 asked Mr. Ford and Mr. Ford is absolutely correct that we have
7 been pressing this issue for some time whether he was, in light
8 of Mr. Ladd's testimony, waiving the privilege and he assured
9 he was not.

10 THE COURT: Okay. Well, look. Obviously I'm going to
11 require some additional briefing on this so we will set a
12 schedule for this. Do you want to talk about your partial
13 motion for summary judgment now, Ms. Brown?

14 MS. BROWN: Sure.

15 I am going to call on Mr. Kaufman if I need him for
16 substance but the motion is the same as the one that we
17 detailed for the Court in our letter of a few months ago, it is
18 on the non-scienter claim that is Section 5, Section 16, and
19 Section 13(d) and relate to Mr. Ladd's trading in May 2016 in
20 his own and his father's account which we contend violated
21 Section 5. And, in connection with his filings of false
22 Form 4s which detail what his transactions were in MGT
23 Securities. We contend that he filed false Form 4s in
24 violation of Section 16. And, we also allege that he failed to
25 disclose his own holdings of MGT in excess of 5 percent which

L465sechonigC

1 is a requirement of Section 13(d). And, as I say, none of
2 these are scienter-based so they appear to be ripe for summary
3 judgment because there really are no issues of fact.

4 THE COURT: Very well. So, we will schedule that as
5 well and both motions will be on a three-week, three week, one
6 week schedule which is to say, Ms. Brown, you can make your --
7 you will be given three weeks to make the motion, Mr. Ford will
8 be given three weeks to respond, and you will have one week to
9 reply.

10 Now, Mr. Ford, given that there is going to be
11 additional briefing on this advice of counsel issue and given
12 that your proposed motions deal with those claims that are
13 scienter-based, it seems to me that it is probably premature
14 for you to make that partial motion for summary judgment at
15 this time. Do you disagree?

16 MR. FORD: Thank you, Judge. This is Adam Ford
17 responding.

18 My first response, your Honor, is based on the way you
19 framed it, it does make sense although I would -- I guess sort
20 of, from my position, discovery is closed. The SEC had all the
21 time that it requested to take all of the discovery that it
22 wanted. It made certain decisions not to depose certain
23 people -- a lot of -- by the way, a lot of what Ms. Brown had
24 argued in the last segment about Mr. Kesner, frankly, is
25 completely new to me. I don't -- I don't even -- I don't

L465sechonigC

1 believe it is in the complaint, I just -- I don't remember
2 exactly but the focus on that, the idea that Mr. Kesner had
3 these interactions, I don't even think I am aware of that. I
4 don't know where it comes from, it hasn't been in discovery.
5 Certainly, if the SEC believes that Mr. Kesner was, that the
6 lawyer, right, was somehow involved in this scheme I would have
7 expected him to have been, frankly, added as a defendant or
8 some sort of reference to it. That is all new. In any event,
9 they absolutely had an opportunity to depose Mr. Kesner and ask
10 him about non-privileged communications because all of his
11 communications with counsel for MGT on these are not privileged
12 and the SEC had that opportunity and, frankly, they had the
13 opportunity to take Mr. Kaplowitz' -- MGT's lawyer's --
14 deposition and ask him about non-privileged communications that
15 he had with Mr. Kesner or other members. So, this idea that
16 the SEC is all of a sudden needs, is somewhat surprised in our
17 position that they have known about from the first day since I
18 got involved in this case and now take more discovery on this,
19 to me, seems, as I argued, not appropriate.

20 So, on one hand I would sort of suggest discovery is
21 over, the SEC has not obtained any evidence to date, we do
22 think it is appropriate for us to file our motion for summary
23 judgment based on the discovery to date. That would be our
24 first position. To the extent your Honor is I guess sort of
25 going to consider this issue of waiver and whether there needs

L465sechonigC

1 to be more discovery then it might be premature but I think I
2 would still put before the Court that it would be -- I know we
3 would still like to file our motion for summary judgment
4 because discovery is over and now is the time and it is only
5 now that the SEC is first trying to get more discovery after
6 the close.

7 THE COURT: So, let me ask this. Presumably part of
8 your motion for summary judgment, if it were to be made, would
9 be you have indicated that the SEC has no -- had no evidence of
10 knowledge of group activity and presumably you will also make
11 the argument that the record is clear that Mr. Ladd made these
12 decisions in good faith.

13 MR. FORD: That's correct.

14 THE COURT: If you make the motion we will probably be
15 right back where we are. But -- go ahead.

16 MR. FORD: Do you mean we will be right back where we
17 are because -- I'm not certain I understand that.

18 THE COURT: The SEC will say, you know, they've raised
19 this issue, it's a disputed fact, and either it should be
20 denied on that basis or we should be entitled to further
21 discovery.

22 MR. FORD: But I guess I am a little -- the way I want
23 to respond to that is the SEC, in order for them to say it's
24 disputed fact, they're going to have to point to some sort of
25 evidence and we assert that there simply is none, other than

L465sechonigC

1 that these two e-mails that we highlight, which we will
2 address, but for a party to be able to say well, wait a second,
3 your defendant raises that we have no evidence and now we would
4 like to go take more discovery, that's not a -- this is a civil
5 litigation and when discovery closes, just because one side is
6 able to step forward and say, look, the plaintiffs have failed
7 to meet the burden here, there is no material dispute of fact,
8 I am not certain how the SEC gets to simply say, well, then
9 allow us to take more discovery because that would sort of meet
10 with an endless cycle of discovery for a losing side at least.
11 Discovery is over. There is no evidence. We are going to
12 prove that in our papers. And I guess if the SEC wants to
13 respond by saying we would like to take more discovery, I think
14 I would still propose that we do brief this and if that's the
15 right result and the SEC can prove that they are entitled to
16 more discovery based on the briefing, then I guess we would be
17 prepared to accept that as a possibility; that we file a brief
18 that is ultimately either held in abeyance or mooted pending
19 further discovery. But I think that's the right way to proceed
20 here rather than waiting. Otherwise, maybe I would -- I think
21 the flipside, I would propose that all summary judgment motions
22 be stayed pending -- if we want to deal with the privilege
23 issue first my sense is we should either deal with the
24 privilege issue and whatever that result is move to summary
25 judgment motions, or we should all do our summary judgment

L465sechonigC

1 motions, I guess, in conjunction with the privilege issue.

2 THE COURT: Ms. Brown, do you have a view on that
3 proposed approach?

4 MS. BROWN: Your Honor, I actually came prepared this
5 morning to say that I think that's fine as long as we deal with
6 the discovery issues first. And, just one point I don't want
7 to be lost, Mr. Ford keeps saying we have raised this issue
8 after discovery is closed. Well, there is a very good reason
9 for that, as I am sure the Court is aware and as has been part
10 of our scheduling order since the beginning, which is that
11 there was always the idea that once the defendant answered
12 there may be additional time for discovery as needed and here
13 Mr. Ford and Mr. Ladd's answer raised the issue that we need
14 discovery on. So, it is not like we sat back and waited for
15 this opportunity to reopen discovery.

16 I just don't want that to be lost on the Court.

17 THE COURT: Okay. So, you are in general agreement
18 that we should deal with this issue first and then the parties
19 can move for summary judgment.

20 MS. BROWN: I'm fine with that, your Honor.

21 THE COURT: Okay. So then we will move on that issue
22 first and the other, the dueling summary judgment motions, will
23 be held in abeyance.

24 Ms. Rivera, do we have the date for the motion?

25 THE DEPUTY CLERK: Yes. The motion is due April 27th,

L465sechonigC

1 the opposition is due May 18th, and the reply is due May 25.

2 THE COURT: Okay. So you all have the dates, it will
3 be in the minute entry.

4 We are adjourned. Everyone, please, stay well.

5 o0o